

**Evans v Punter**

2023 NY Slip Op 31463(U)

May 2, 2023

Supreme Court, New York County

Docket Number: Index No. 154101/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 154101/2020

PAUL EVANS,

MOTION SEQ. NO. 006

Plaintiff,

- v -

MALCOLM A. PUNTER, AARIAN PUNTER, RUCKER  
PARK PREP FOUNDATION, and HARLEM  
CONGREGATIONS FOR COMMUNITY IMPROVEMENT,  
INC.,**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for

CONTEMPT.

In this defamation and libel action, plaintiff moves, pursuant to CPLR 2308 and Judiciary Law §§ 750-751, and 753, for an order finding nonparty New York City Department of Parks and Recreation (Parks Department) in contempt.<sup>1</sup>

*Factual and Procedural Background*

Plaintiff commenced this action in June 2020 after defendants sent several allegedly defamatory communications to his employer, the Parks Department, following an incident at a local public park (Doc No. 1). He alleged that such communications caused him to be subjected to internal disciplinary proceedings and denied an internal promotion (Doc No. 1). During discovery, he sought to serve a subpoena duces tecum upon William Castro, a Parks Department official, for all communications between the Parks Department and defendants (Doc No. 106).

<sup>1</sup> Plaintiff seeks to specifically hold Anthony Perez, the Parks Department's Commissioner for the Borough of Manhattan, in contempt (Doc No. 102).

The subpoena was So-Ordered on May 3, 2021 (Doc No. 106), and the Parks Department responded thereafter (Doc Nos. 109, 116).

At defendant Aarian Punter's deposition, she allegedly revealed that plaintiff's conduct was discussed at a meeting between members of the Parks Department and a New York State Assemblymember that took place shortly after the incident in the park (Doc No. 105). Additionally, at Castro's deposition, he allegedly stated that he had discussed the action with the Parks Department's general counsel (Doc No. 105). Plaintiff sent a letter to the Parks Department demanding records from these meetings because they had not been provided in the initial response to the subpoena (Doc Nos. 111, 114). The Parks Department responded to his request by providing documents containing redactions of "non-responsive and personal contact information" (Doc Nos. 112, 115).

Plaintiff now moves for an order holding the Parks Department in criminal and civil contempt for failing to comply with the So-Ordered subpoena (Doc Nos. 102, 104). The motion is unopposed.

### Legal Analysis and Conclusions

#### Civil Contempt

The elements required to support a finding of contempt are well established: (1) "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect;" (2) "[i]t must appear, with reasonable certainty, that the order has been disobeyed;" (3) "the party to be held in contempt must have had knowledge of the court's order;" and (4) "prejudice to the right of a party to the litigation must be demonstrated" (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). The movant bears the burden of proving contempt "by

clear and convincing evidence” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; accord *Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Ltd.*, 214 AD3d 473, 474 [1st Dept 2023]).

The documents submitted by plaintiff in support of his motion fail to establish by clear and convincing evidence that the Parks Department disobeyed this Court’s May 2021 So-Ordered subpoena duces tecum. The record indicates that the Parks Department responded to the subpoena with documents that contained redactions of “non-responsive and personal contact information.” Although it provided a response in parts, it appears to have provided the documents responsive to the subpoena. Such “substantial compliance” is insufficient to establish a basis for holding the Parks Department in contempt (*Cayre v Pinelli*, 172 AD3d 611, 611 [1st Dept 2019] [affirming denial of civil contempt motion because respondent provided enough information and singular error was inadvertent mistake]; cf. *Rosenman Colin Freund Lewis & Cohen v Edelman*, 165 AD2d 706, 707 [1st Dept 1990] [upholding contempt orders because “(p)laintiff demonstrated with reasonable certainty that the subpoenas were disobeyed, that counsel never answered plaintiff’s request for confirmation of representations in writing, and would not agree to a date certain for deposition even during oral argument”]).

Plaintiff has also failed to demonstrate that the Parks Department’s conduct prejudiced his rights. It appears that the Parks Department made genuine efforts to respond to the subpoena initially and to timely respond to plaintiff’s post-deposition demands; its actions were not “calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding” (*Oppenheimer v Oscar Shoes*, 111 AD2d 28, 29 [1st Dept 1985]; accord *Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 [1st Dept 2001]; cf. *Ficus Invs., Inc. v Private Capital Mgt., L.L.C.*, 66 AD3d 557, 558 [affirming contempt order because defendant’s

actions in negotiating mortgage conveyances without timely notifying plaintiff were done to prejudice plaintiff's rights]).

Therefore, plaintiff's request for an order holding the Parks Department in civil contempt is denied (*see Cayre*, 172 AD3d at 611).

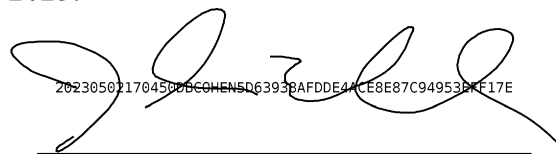
Criminal Contempt

Quite simply, plaintiff's contention that the Parks Department should be held in criminal contempt for failing to comply with a subpoena is meritless given that the "[f]ailure to obey a subpoena in civil proceedings is . . . a civil but not a criminal contempt" (*James v Powell*, 26 AD2d 295, 296 [1st Dept 1966] [analyzing difference between criminal contempt covered by Judiciary Law § 750 and civil contempt covered by Judiciary Law § 753], *affd* 18 NY2d 931 [1966]; *see* 58A NY Jur 2d, Evidence and Witnesses § 805 ["Failure to obey a subpoena in a civil proceeding is a civil, not a criminal, contempt"]). Therefore, plaintiff's request for an order holding the Parks Department in criminal contempt is denied.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for a contempt order is denied in all respects; and it is further

ORDERED that the parties shall appear for the scheduled status conference (in person) at 71 Thomas Street, Room 305, at 10:00 a.m., on May 9, 2023.



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DAVID B. COHEN, J.S.C.

5/2/2023  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE